PREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. [redacted] 157

UNITED STATES OF AMERICA,
Respondent,

v.

DOUGLAS HOUSTON and JOHN LEWIS SIMPSON,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case May 7, 1968.

OPINIONS BELOW

Neither the opinion of the District Court for the Eastern District of Tennessee, Northeastern Division, nor of

the Court of Appeals for the Sixth Circuit is reported. The Court of Appeals for the Sixth Circuit did not write an opinion. The Trial Court's opinions are in the appendix at pages 17 and 67.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

QUESTION I

Did the Court err in holding, after ruling

A. The search warrant invalid

B. That the search and seizure resulted from the execution of that warrant

that the search was made on probable cause, and as incidental to a lawful arrest overruling defendants' motion to suppress?

QUESTION II

Did the Court err in disallowing the defendants' position that the government was estopped from seeking to rely on "probable cause" when the government's own chief witness who was in charge of the arresting party testified that he acted in both the arrest and the search relying on the search warrant and the warrant alone—a warrant which the Trial Court has ruled invalid?

QUESTION III

Did the Court err in denying defendants' motion to require the government to reveal the identify of the government's paid informer?

STATUTES, FEDERAL RULES AND REGULATIONS INVOKED

The pertinent portions of Title 26, Section 5202(a)(2) and 5604(a)(1), U.S.C. 4(a), are set forth in the appendix hereof at page 76.

STATEMENT

The petitioners were arrested on March 11th, 1967 by the United States officers acting under the apparent authority of a search warrant dated March 11, 1967 (APP. pp. 22-23, 38, 45-46). On March 30th, 1967, an indictment was filed charging petitioners with violations of the statutes cited above.

Federal agents received information prior to March 6, 1967 from a paid government informer, a known bootlegger and competitor of the petitioners, that petitioners were in the business of selling tax unpaid whiskey (APP. pp. 27-37, 44-45).

As a result of the information from the informer, the agents conducted a surveillance of the defendants, and during several days of watching the defendants from the building near where the defendants were arrested, the agents saw nothing more than petitioners handling boxes with "Ball Mason Jars" printed on the boxes (APP. pp. 34, 39, 40).

On March 6, agents stopped a vehicle occupied by the petitioners on private property adjacent to the dwelling house occupied by petitioner Douglas Houston and served the search warrant, found whiskey and arrested the petitioners (APP. pp. 25-26, 45-46).

The petitioners pled not guilty on arraignment, and filed a motion to suppress evidence on the ground that the search warrant was invalid (APP. p. 14) and accordingly the search and seizure were ruled invalid.

The Court ruled the search warrant invalid, but overruled the petitioners' motion to suppress on the ground that the arrest was made on probable cause and that the search was made incidental to a lawful arrest (APP. pp. 20, 71).

The Court overruled petitioners' motion to require the government to reveal the identity of the informer (APP. pp. 63-66).

On the hearing the jury found the defendants guilty and a Judgment was entered September 21, 1967, an appeal was perfected in the United States Court of Appeals for the Sixth Circuit, and on the 7th day of May, 1968, the Court of Appeals for the Sixth Circuit affirmed the Judgment of the lower Court (APP. p. 75).

REASONS FOR GRANTING THE WRIT

The decision below should be reversed because it is contrary to the decisions of this Honorable Court on the issues involved. The Court in holding that the arrest was valid relied on the cases which hold that arrest made on "probable cause" without a warrant, is legal where the search is made incidentally to the lawful arrest. There can be no argument that this is the rule that has been followed by this Court in the past and petitioners do not argue with the rule, but seriously contend that there is no probable cause and that the government is estopped by reason of the fact that they made the search relying on the government's agents admission that the arrest was made pursuant to the warrant rather than to any lawful arrest.

If the arrests were not legal, the officers had no right to conduct a search, because it is well settled that to justify a search as incidental to a lawful arrest the arrest must in fact be a lawful one. *Carroll v. United States*, 276 U.S. 132, 45 S.Ct. 280; *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341.

Whether or not the arrest is lawful, when there is no arrest warrant or search warrant, and when no crime is committed in the presence of the officers, seems to turn on whether the primary intent was to search or whether the intent was to make an arrest.

It is well recognized that the intent of the arresting or searching officer is of paramount importance in determining the issue. If the intent is to make the arrest and then conduct the search, petitioners submit that there is no basis for the government to make a convincing argument that the officers would have made an arrest in this case had there been no search. It is obvious from all facts in the record that there would have been no arrest had the search not been fruitful.

It is clear from the reasoning in *Jones v. United States*, 357 U.S. 493, 2 L. Ed. 2d 1514, 78 S.Ct. 1253, that the primary determining factor is the intention of the officers. If the intention were to search for the evidence seized rather than to arrest the defendant, the ensuing search is invalid. In *Jones* the Court relied on the testimony given by the officers of the searching party in determining the intent. The Court in summing up the government's contention stated:

> "The Government, however, for the first time now maintains the search and seizure were justifiable as is: The federal agents involved in this search had authority under federal law to arrest without a war-

rant upon probable cause to believe that a person had committed a felony. From the record it is 'rational' to infer that the federal agents with the purpose of arresting him upon probable cause to believe that he was guilty of a felony and that he was then in the house. Consequently, the agents' entry was justified and, once in the house, while searching for petitioner, they could seize all contraband material in plain sight. The fact that the petitioner was not found does not vitiate the legality of the seizures."

The intent to search rather than to arrest is no clearer in the *Jones* case than it is in the case at hand. Of course in both cases, this is the element that causes the ensuing arrest to be invalid.

The Court does not have to attempt to infer what the intent of the officers was in the present case, because their intent is clearly stated in the testimony, the avowed purpose being to execute the search warrant and make the search called for in the warrant. Nowhere in the record is there any evidence that the search was not made relying on the warrant the officers had in their possession. Naturally the intent of executing a search warrant is to make a search and with the further provision that if the search reveals contraband arrests will be made. This, it seems, is what the Court had in mind when it said in *Jones*:

"Although it must be recognized that the basis of the two lower court decisions is not wholly free from ambiguity, a careful consideration of the record satisfied us that the search and seizure were considered to have been justified because the officers had probable cause to believe that the petitioner's house contained contraband materials which were being utilized in the commis-

sion of a crime and not because the search and seizure were incident to the petitioner's arrest. So viewed the judgments below cannot be squared with the Fourth Amendment to the Constitution of the United States and with the past decision of this Court."

The District Attorney's office, after the Court ruled the warrant invalid, as an afterthought and an after the fact procedure raised the question of probable cause. The petitioners do not argue that legal arrest cannot be made on "probable cause" but do argue seriously that the concept of "probable cause" does not supply the necessary intent or correct the illegal intent in the minds of the arresting and searching officers at the time of the arrest.

There is another good reason why the decision below should be reversed. The informer, whose information started the investigation in the present case and the information which he gave to the officers were both unreliable if not in fact fraudulent. The government's case is based on the search made on "probable cause" as incident to a lawful arrest. The motives, background, reputation and all aspects of the informer's existence, under these circumstances, become critically important.

The whiskey was not found where the informant advised officers it would be (APP. pp. 32-33). The informer was paid (APP. p. 45) and had himself been in the illegal whiskey business (APP. p. 47).

The petitioners' moved that the government be required to reveal the identity of the informer (APP. pp. 54, 55, 63-65) and the Court overruled the motion (APP. pp. 65-66).

In *Aguilar v. Texas*, 378 U.S. 108, this Court held that before a search warrant could properly issue upon infor-

mation supplied by an informant, the Magistrate being asked to issue the warrant must be informed, not only (1) of some of the underlying circumstances from which the police concluded that the informer was credible, but (2) of some of the underlying circumstances from which the informer concluded that the evidence to be seized was where he claimed it was.

It is obvious that the facts of the instant case do not meet the *Aguilar* test. Nowhere in the record does it appear where the agents were aware of the circumstances from which the anonymous informant concluded that the narcotics were at the location he told them. Not only is this fact true, but additionally the officers did not at any time see any contraband at or near the location described by the informant and when they searched these locations did not find any contraband. Therefore, obviously the informant was completely in error at all times in the information that he gave the officers concerning the location of the contraband. Certainly, under no circumstances, where the informant does not have any reliable or accurate information regarding the location of the contraband could a search warrant have issued legally. And as set forth in *Aguilar* the agents would also have been unable to obtain a valid arrest warrant, the standards being the same. Accordinly, they could not have made a legal arrest without a warrant. This doctrine was recently upheld in the United States Court of Appeals for the Second Circuit in United States v. Soyaka, ... F. 2d ..., January 18, 1968. In that case, the Court reversed the conviction of the appellant for the reason that the record did not disclose or in any way establish the basis for the informant's conclusion that the appellant had narcotics in his apartment. The Court rejected the government's position that *Aguilar* did not apply because

the informant gave a "wealth of detail" which made it clear that he knew the location of the contraband by personal observation. The instant case clearly falls within the purview of the *Aguilar* and *Soyaka* cases and accordingly should be dismissed.

CONCLUSION

For the foregoing reasons, the petitioners respectfully submit that this cause should be reversed and the charges against them dismissed.

Respectfully submitted,

G. EDWARD FRIAR,
1114 West Clinch Avenue,
Knoxville, Tennessee,

Attorney for Petitioners.

May 31, 1968.

In The

UNITED STATES DISTRICT COURT

Eastern District of Tennessee

Northeastern Division

Criminal No. 6957

UNITED STATES OF AMERICA,
Plaintiff,

v.

DOUGLAS HOUSTON and JOHN LEWIS SIMPSON,
Defendants

RELEVANT DOCKET ENTRIES

March 27, 1967 Indictment filed.

March 30, 1967 Copy of Indictment and Arraignment returned, unclaimed at this addressee, 1000 Fairview St., Johnson City, Tenn., remailed 3-30-67 to 1613 East Fairview, Johnson City, Tenn.

April 3, 1967 Defendants arraigned and entered plea of not guilty. Motion to suppress to be filed. Set for trial and hearing on motion to suppress at 9:00 a.m., Friday, April 21, 1967.

April 17, 1967 Motion by defendants for return of property and suppression of evidence, filed. Brief in support of motion filed. Service by counsel.

April 20, 1967 U. S. Response to motion for

return of property and suppression of evidence filed. Service by counsel.

April 21, 1967 Memorandum opinion and order, Neese, D.J., the court concludes that the search warrant issued herein is fatally defective. This finding and conclusion renders redundant any consideration of other claims by the defendants concerning the invalidity of the search warrant herein. The Court reserves a decision on the defendants' motion to suppress the evidence obtained as a result of this search of the property of the defendant Houston, pending a determination of whether such search was reasonable as an incident to a lawful arrest, filed. Service by clerk.

April 21, 1967 Hearing on defendants' motion to suppress evidence. Evidence heard by the Court. Counsel ordered to file briefs within 10 days with 5 additional days allowed to answer briefs. Set for trial, if necessary, to commence Wednesday, June 21, 1967 at 9 a.m. or as soon thereafter as possible.

June 16, 1967 Memorandum Opinion and Order, Neese, D.J., defendants' motion to suppress the evidence obtained in the search herein is denied. Entered in Min. Book 37, page 80, filed. Service by clerk.

June 21, 1967 Trial to jury as to both defendants. Evidence presented; stipulation entered waiving argument; charge of the Court. VERDICT: Guilty as to each defendant. Defendants referred. To stand on present bond.

June 23, 1967 Notice of Appeal from the order denying the defendants' motion to suppress evidence entered June 16, 1967, and from the verdict of guilty returned by the jury on June 21, 1967, filed. Service by clerk.

July 24, 1967 Order, Neese, D.J., upon

motion of the defendants, the defendants are granted an extension of fifty days from the date of the filing of the Notice of Appeal, to have the records certified to the Court of Appeals for the Sixth Circuit, thereby allowing defendants a total of ninety days from the Notice of Appeal for such certification and filing. Entered in Min. Book 37, page 116, filed. Service by clerk. Copies to counsel for defendant; U. S. Attorney and clerk of Court of Appeals by clerk.

August 30, 1967 Transcripts of hearing on motion to suppress and trial, filed.

September 21, 1967 Judgment—Douglas Houston: Fined the sum of $1,000.00; 5 years imprisonment, eligible for parole 18 U.S.C., Section 4208(a)(2). To stand committed until the fine is paid or he is otherwise discharged by due course of law. Subject to defendant's good behavior, he will stand on his present bond until the matter now pending in the United States Court of Appeals for the Sixth Circuit is disposed of.

September 21, 1967 Judgment—John Lewis Simpson: Fined the sum of $500.00; 1 year imprisonment, eligible for parole 18 U.S.C., Section 4208(a)(2). To stand committed until said fine is paid or he is otherwise discharged by due course of law. Subject to defendant's good behavior, he will stand on his present bond until the matter now pending in the United States Court of Appeals for the Sixth Circuit is disposed of.

September 21, 1967 Certified record on appeal mailed to U. S. Court of Appeals, Cincinnati, Ohio.

[Caption Omitted]

INDICTMENT

(Filed March 28, 1967)

The Grand Jury charges that on or about the 11th day of March, 1967, in the Northeastern Division of the Eastern District of Tennessee and within the jurisdiction of this Court, Douglas Houston, also known as Douglas William Houston, and John Lewis Simpson possessed certain distilled spirits, to wit, whiskey, the immediate containers thereof not then and there having affixed thereto stamps evidencing the determination of the tax and indicating compliance with the provisions of the Internal Revenue Laws of the United States relating to distilled spirits. (Title 26, Sections 5205(a)(2) and 5604(a)(1) U.S.C.)

/s/ John A. Reddy
United States Attorney

A True Bill:

/s/ Carl A. Jones
Foreman

[Caption Omitted]

MOTION FOR RETURN OF PROPERTY AND SUPPRESSION OF EVIDENCE

(Filed April 17, 1967)

Come the defendants through their attorney to move the Court for a return of certain property heretofore seized by the United States Government and to suppress as evidence anything so obtained from or through the government's possession of the said property and for the suppression as evidence of any information, property, or other material matter obtained under the aegis of that certain search warrant issued on the eleventh day of March, 1967, naming the defendant, Douglas Houston, as a defendant therein and relating to property described as "405 Welborne Street, Johnson City, Tennessee," for the reason that:

(1) The warrant is insufficient on its face.
(2) The property seized is not that described in the warrant.
(3) There was not probable cause for believing the existence of the grounds on which the warrant was issued.
(4) The warrant was illegally executed.

II. That the said warrant is invalid and unconstitutional and illegal for the reason that it is insufficient on its face in that it does not name an affiant, does not allege that the information is from a usually reliable source or that the affiant has reason to believe that the information he has given is correct or that there is some basis for his having given such information, but that instead the said search warrant is totally blank and devoid of information in this regard since it says, "Affidavit having been made before

me by ..... that he is positive that on the premises known as," this defect is a fatal one and invalidates the said search warrant and all actions taken under its authority.

III. That the description of the property given in the said search warrant is as follows: "Douglas Houston residence, 405 Welborne Street, Johnson City, Tennessee, and adjacent premises, and particularly a white wood shed approximately thirty-five yards to the right rear of said residence," and that the said property seized, searches made, and illegal arrests accomplished were not at any time nor to any degree at the "Douglas Houston residence," "405 Welborne Street," "adjacent premises," nor at or near "a white wood shed approximately thirty-five yards to the right rear of said residence." But that instead the said illegal seizures, searches, and arrests were made at another address, on property belonging to another individual not named in the said warrant and certainly not belonging to the defendant, Douglas Houston, and that none of the said searches, seizures, and arrests were made at the locale described in the said search warrant but that all were made on entirely different property with entirely different ownership and over which these defendants nor either of them had any ownership or control and definitely not described in the said search warrant about which complaint is herein made.

IV. That the warrant is invalid for the reason that on the "return" the statement is made that certain listed property was obtained by a search of "the premises described in the warrant" when the facts are otherwise and to the contrary, and that the "return" further says that "the following is an inventory of property taken pursuant to the warrant" thus committing the United States Govern-

ment to the position that the said property seized was taken *pursuant to the warrant* when the facts are clearly otherwise and to the contrary and that the said property seized, the searches made, the arrests accomplished, were all conducted on property other than that described in the warrant, and that none of the illegal activities took place on the property described in the warrant nor in the places described in the warrant nor at the locale described in the warrant. That since the United States Government relies on the warrant and sets out in the affidavit of its agent and employee that the property was taken "*pursuant to the warrant*" that the property seized is being held illegally and unconstitutionally and should be returned to the defendant herein and that any evidence obtained thereby should be suppressed in any court of justice to which this defendant is called to account, and that the charges against these defendants arising out of the issuance and execution of the said warrant should be hence dismissed.

RESPECTFULLY SUBMITTED;

/s/ G. Edward Friar
G. Edward Friar
Counsel for Douglas Houston
and John Simpson

CERTIFICATE OF SERVICE

I, G. Edward Friar, Attorney for the Defendants hereby certify that on this date, Friday, April 14, 1967, I have served a copy of the foregoing Motion upon the office of the United States Attorney for the Eastern District of Tennessee by hand delivering the said copy to the office of the United States Attorney in the Federal Building, Knoxville, Tennessee.

/s/ G. Edward Friar
G. Edward Friar

[Caption Omitted]

MEMORANDUM OPINION AND ORDER

(Filed April 21, 1967)

These defendants, aggrieved by an alleged unlawful search and seizure, have moved this Court in the district in which such property was seized for the return of the property and to suppress for use as evidence contraband so obtained on the ground, *inter alia*, that the warrant is insufficient on its face. Rule 41 (e) (2), Federal Rules of Criminal Procedure. No evidence on any issue of fact is necessary to a decision on the motion, *cf. idem*, as it relates to the search warrant.

On March 11, 1967, Robert E. Rhea, an agent for the Tennessee Alcoholic Beverage Commission, made affidavit before a United States commissioner setting forth certain facts. That commissioner, being satisfied therefrom that probable cause existed that certain tax-unpaid whiskey was being concealed on the residential premises of the defendant Douglas Houston at 405 Welborne [sic: Melbourne] Street, Johnson City, Tennessee, and that the stated grounds for application for the issuance of a search warrant existed, issued on the same date a search warrant for the aforenamed defendant's premises. Obviously due to a clerical error, oversight or omission, the said warrant did not recite the name of the aforenamed affiant. The aforementioned affidavit is preserved in the record herein, and the only question is whether the clerical mistake in the search warrant may now be corrected. Rule 36, Federal Rules of Criminal Procedure. The search and seizure herein resulted from the execution of such warrant.

The Court finds and concludes from the record herein that it cannot. A search warrant must "* * * state the grounds or probable cause for its issuance and the names of the persons whose affidavits [were] taken in support thereof. * * *" Rule 41 (c), Federal Rules of Criminal Procedure.

"* * * The demand of Rule 41 for the affiant's name is in furtherance of the Fourth Amendment and is not without purpose. It has been said that someone must take the responsibility for the facts alleged, giving rise to the probable cause for the issuance of the warrant [citations omitted]; and the defendant should be apprised of the name of that person [citation omitted]. When the affiant is cloaked in secrecy there is no one who can be held responsible.

"* * * Another reason for naming the affiant is to enable an aggrieved person to probe and challenge the legality of the warrant. Section 41(e) of the rule makes this plain.[4] * * * It is established law that the warrant would be fatally defective if no name were mentioned. * * *

"4 (in original)

"* * * [T]he rule [that the aggrieved person cannot challenge the truthfulness of the facts alleged by the affiant] in the federal courts is otherwise, and false facts given by the affiant will vitiate the warrant and the search. Steele v. United States (No. 1), 1925, 267 U.S. 498, 45 S. Ct. 414, 69 L. Ed. 757 [other citations omitted]. * * *"

King v. United States, C.A. 4th (1960), 282 F.(2d) 398, 400 [2], [3].

The search warrant "* * * should be full and complete in itself. * * * It should contain * * * the names of the persons whose affidavits have been taken in support thereof, that is, those who prove the particular grounds or probable cause.

* * *

"It is believed that * * * the foregoing requirements are demanded by the Constitution or the [rule], and that failure to observe [either] of them is bad practice. But such failure is not in every instance[1] fatal, and statement will be made of what is essential and what is merely directory.

* * *

[1] None of these "instances" are pertinent here.

"'The warrant shall be full and complete in itself,' both to the essentials and as to the directions; the first because essential, and the second in order that * * * the accused may promptly know what is the accusation against him, and upon what it is based. * * *.

* * *

"'Should state * * * the names of the persons whose affidavits * * * have been taken in support thereof; that is, those who prove the particular grounds or probable cause.'

* * *

"* * * If the names of the * * * affiants * * * are not required to be set forth, there would not be incorporated in the judgment of the commissioner or judge (the warrant) [in determining judicially whether or not the facts proven satisfy the existence of grounds for the application or that there is probable cause to believe their existence] the names of the witnesses * * *, upon whose testimony he relied. * * * [A]n affidavit must be sworn to, and * * * subscribed. [It] must be preserved as a part of the record. * * * This requirement creates a substantial right

for the accused. It is a declaration that he is entitled to know at once, by incorporation in the very instrument claimed to authorize the search and seizure, who have sworn against him. It gives him a right to have formal record of what witnesses were the support of the judge or commissioner.

> "'If the facts afford the legal basis for the search warrant, the accused must take the consequences. But equally there must be consequences for the accuser to face. If the sworn accusation is based on fiction, the accuser must take the chances of punishment for perjury.' [Citation omitted.]

" * * * If Congress desires a change in its policy, it is for Congress to so declare. * * *" *United States v. Kaplan*, D.C. Ga. (1923), 286 F. 963, 966 [1], 969 [6], 970 [9].

This Court, judicially noticing the contents of its records, *United States v. American Oil Company*, D.C. N.J. (1965), 249 F. Supp. 130, 138 [5], finds that the name of the affiant is nowhere mentioned in the search warrant issued herein and concludes that the same is fatally defective. This finding and conclusion renders redundant any consideration of other claims by the defendants concerning the invalidity of the search warrant herein.

The Court reserves a decision on the defendants' motion to suppress the evidence obtained as a result of this search of the property of the defendant Houston, pending a determination of whether such arrest was reasonable as an incident to a lawful arrest.

FILE:

/s/ C. G. Neese
United States District Judge

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS ON MOTION TO SUPPRESS EVIDENCE

(April 21, 1967)

* * *

[2] THE COURT: The Court has considered one part of the Motion by the defendants to suppress the evidence produced as a result of a search by officers and has decided that the search warrant issued in this case was fatally defective in that the warrant did not reflect in the instrument itself the name of the affiant on whose four representations the Commissioner issued the warrant.

A memorandum opinion is in the course of being typed at this time and will be filed.

* * *

[3] MR. SIMPSON: May it please the Court, that case was King v. United States, 282 Fed. 2nd.

THE COURT: You apparently have run across it.

MR. SIMPSON: Yes, sir, I have. In fact, your Honor, I was going to stipulate and admit that the warrant on that ground was fatally defective after doing some further research last night on the question.

THE COURT: All right.

I notice you, before we take the testimony here, that you refer to the Beck case from the Supreme Court on the proposition of the arrest without a warrant and the search as an incident to such arrest. The Beck case doesn't exactly support you in that, does it?

MR. SIMPSON: Not the entire case, your Honor. Part of the case supports me.

THE COURT: Where they mention the general rules?

MR. SIMPSON: Yes, sir.

[4] THE COURT: They quote, I believe, from other decisions, from prior decisions of the Supreme Court. I couldn't understand your reliance on the Beck case is the reason that I brought it up.

If you are relying on their references to earlier decisions, I can follow you.

MR. SIMPSON: Yes, I am, your Honor.

THE COURT: All right.

* * *

[6] **JAMES R. BEELER**

was called as a witness by and on behalf of the Government, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SIMPSON:

* * *

[14] THE COURT: * * * Let me understand now. Do I understand that you yourself made the arrest of these two men?

THE WITNESS: I assisted. There were four officers in my car and we all bailed out at the same time. Investigator Linsey and myself hollered "Federal officers." One of the agents reached Houston first, and one reached Simpson first before either Investigator Lindsey and I got hold of them. In other words, somebody placed

[15] them under arrest directly in front of us. We were all present at the same time.

THE COURT: From your position in the car with the men that made the arrest, what had you seen them do to cause you to place them under arrest?

THE WITNESS: The warrant we had plus the fact the information we had received on the radio.

THE COURT: Did you see them committing any crime in your presence?

THE WITNESS: I did not, no, sir.

THE COURT: Were you in position to see the same as the officers who did make the arrest?

THE WITNESS: No, sir.

THE COURT: I say, were you not in the same position to see what the officers who did make the arrest could have seen?

THE WITNESS: Yes, sir.

THE COURT: All right, go ahead. I just wanted to understand.

Mr. Simpson, what is your contention here?

MR. SIMPSON: Our contention is there were other officers even prior to the arrest were observing the defendants putting the whiskey into the truck. This is even prior to the time that they moved in.

[16] THE COURT: Is it your contention that this search was as a result or incident of a lawful arrest, or what? What is your theory here?

MR. SIMPSON: The contention is, sir, that the officers had probable cause to make an arrest and search and seizure without a search warrant.

THE COURT: But not as an incident to a lawful arrest?

MR. SIMPSON: And also, search also as an incident to lawful arrest.

THE COURT: You are not just shotgunning me, are you?

MR. SIMPSON: No, sir.

* * *

[24] CROSS-EXAMINATION

BY MR. FRIAR:

* * *

[25] Q (By Mr. Friar) Mr. Beeler, I want to be sure who it was with you in the automobile. I believe you said three other officers were with you?

A Yes, sir.

Q May I have their names, sir?

A Robert Rhea, Alcoholic Beverage Commission; Ernest Thacker, Alcoholic Beverage Commission; and Special Investigator William H. Lindsey, Jr.

Q Which one of the gentlemen were driving the automobile?

A I was.

* * *

[27] Q Now, Mr. Beeler, I show you here what purports to be a copy of the search warrant which you had in your pocket on that occasion and on the back on the return——

MR. SIMPSON: May it please the Court, his Honor has already ruled on the search warrant.

THE COURT: Yes, the search warrant has been declared void.

MR. FRIAR: If your Honor please, it has to do with the present position of the government and no reference to the validity or non-validity of the warrant.

THE COURT: All right.

I call the attention of all you gentlemen to the fact the Court is only supposed under the rule to hear such evidence which may be necessary for disposition of the motion. So, I think we need to confine ourselves. However, go ahead. This is cross-examination.

MR. FRIAR: Just this one question.

Q (By Mr. Friar) I show you there, Mr.

[28] Beeler, the return on the search warrant. I want to ask you if that is your signature on that return?

A It is.

Q And if that is the inventory of the materials and goods that you picked up on that occasion on that night?

A Yes, sir.

MR. FRIAR: No other questions.

* * *

ROBERT RHEA

was called as a witness by and on behalf of the Government, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SIMPSON:

* * *

[33] THE COURT: Excuse me, Mr. Simpson. I am confused again. On March 8th—

THE WITNESS: Yes, sir.

THE COURT: At 7:10 you saw both of the defendants go to this shed again. Is that right?

THE WITNESS: Yes, sir.

THE COURT: And you saw that each one of them carried apparently a heavy cardboard carton from the shed and put it in the bed of the truck. Is that right?

THE WITNESS: Yes, sir.

THE COURT: Now, when was it you saw them come back?

[34] A At 7:30 they both returned in the truck and took the cases of whiskey out of the truck and placed them behind the fallen tree branch in this vacant lot.

Q How did you know it was whiskey?

A Just saw them place the cases they placed in the truck when they took them out. I don't know that they were the same cases, but they appeared to be heavy cases

the way the men were carrying them, leaned back, and placed them on the ground behind this fallen tree branch.

Q The point I am trying to make is, you said three cases of whiskey?

A Well, sir, that was oversight on my part. It appeared what I thought was whiskey because of information I had and knowledge I had of the type containers used in this area to carry whiskey in.

Q Did you see anything that made you think there was whiskey in these cartons?

A Not at that time, no, sir.

Q Did you smell anything?

A No, sir.

Q Did you hear anything?

A No, sir.

Q Feel anything?

A No, sir.

[35] Q Taste anything?

A No, sir.

Q Based entirely on the fact somebody told you these people had whiskey there at that time?

A Yes, sir.

Q At that time?

A Yes, sir.

Q Somebody told you they had whiskey there at that moment?

A They said whiskey was stored in a shed.

Q Somebody told you that previously?

A Yes, sir.

THE COURT: All right. Excuse me. Go ahead.

* * *

[39] Q Were you present at the arrest of these defendants?

A Yes, I was.

* * *

[40] Q Mr. Rhea, I believe you started this investigation and observation of defendants from an informant?

A Yes, sir.

Q Have you received information from him
[41] before as to these defendants?

A I have, sir.

Q Have you received information before as to other defendants?

A Yes, sir, I have.

Q Has that information been reliable?

A It has, sir.

THE COURT: That is a conclusion. I would like to know the facts. If you are going to try to credit this information, I would like to know specifically—you don't have to call his name, but I would like to know specifically the occasions, when they were; what they were; what the man told him, and what they found.

THE WITNESS: Well, sir, I don't have any dates with me. I don't recall them offhand as of the date.

THE COURT: You have told Mr. Simpson that you had had information about Mr. Houston from this same informer before?

THE WITNESS: Yes, sir.

THE COURT: All right, had that produced an arrest and a conviction?

[42] THE WITNESS: No, sir, we didn't have a place to set up observation.

THE COURT: About how long was this before he brought you information this time?

THE WITNESS: Approximately two weeks, sir.

THE COURT: Was this a paid informant?

THE WITNESS: No, sir, the State doesn't have a fund for paid informants.

THE COURT: Do you know if the Federal government paid them or not?

THE WITNESS: No, sir, I do not.

THE COURT: Do you know why this person was bringing you information about Mr. Houston?

THE WITNESS: No, sir, I don't.

THE COURT: State what occurred. Don't call his name or anything; just what did he tell you? How did it come about?

THE WITNESS: On previous occasions, I guess the first time the man called.

THE COURT: The man called?

THE WITNESS: Yes, sir. He called at our office and wanted to talk to someone and I think Mr. Combs talked to him on that occasion.

THE COURT: You didn't talk to him?

[43] THE WITNESS: Not on the first occasion he called.

THE COURT: This is also an Alcohol & Beverage Commission Agent, Mr. Combs is?

THE WITNESS: Yes, sir.

THE COURT: And he told you about this?

THE WITNESS: Yes, sir.

THE COURT: And told you the man's name and identified him to you?

THE WITNESS: Yes, sir.

THE COURT: Then what was the next contact you knew about the man had with your office?

THE WITNESS: On another occasion he called and left word with our answering service that he would like to see us. We went out to see the man at night.

THE COURT: Did you go?

THE WITNESS: Yes, sir, I did, along with Mr. Combs, and talked to the man. He told us a car with whiskey in

it would be coming a certain direction at a certain time. We went out the same evening and observed this car, as the informant had advised it would be there. We stopped the car, arrested and found whiskey in the car.

[44] THE COURT: Was that Mr. Houston?

THE WITNESS: No, sir, it wasn't.

THE COURT: I thought we were talking about now—well, let's start back to the first time you knew anything about this informer performing his informing. Go back to the first time you knew anything about this man giving information of law violators, which every citizen ought to do, by the way.

THE WITNESS: I don't understand. Do you mean of anybody or just Mr. Houston?

THE COURT: Anybody, the first time—you came up there in September, did you not?

THE WITNESS: Yes, sir.

THE COURT: Had you had any contact with this informer before September?

THE WITNESS: No, sir.

THE COURT: When you got up there, what was the first time that you knew this man was providing officers with information of law violators?

THE WITNESS: Probably two or two and a half months after I got to Johnson City.

THE COURT: Something like the first of the year?

THE WITNESS: Yes, sir.

[45] THE COURT: And what was that occasion?

THE WITNESS: I don't remember the date, but we had occasion to go and talk to this man. The first time he called. The first time I saw him was——

THE COURT: Now, wait. You are asking the Court here to accept your conclusion that this man was a proven reliable informer. I have got to know what you base that on.

Now, what is absolutely the first contact you had with him? Was that the telephone call that he made?

THE WITNESS: I didn't have any contact with him over the telephone.

THE COURT: Did one of the other agents tell you he did have?

THE WITNESS: Yes, sir.

THE COURT: All right, what was your first contact with him?

THE WITNESS: My first contact with him was approximately two weeks after that when he left word that he would like to see Agent Combs and myself.

THE COURT: Was that the occasion that you
[46] went out and made the arrest based on what he told you?

THE WITNESS: Yes, sir.

THE COURT: Was there a conviction in that case?

THE WITNESS: Yes, sir.

THE COURT: What was the next contact of any kind that you had with this man so far as informing is concerned?

THE WITNESS: The next contact I had—I don't remember the date, but the occasion the man told me and Agent Combs, and got in the car with us and showed us several places Mr. Houston was supposed to be allegedly leaving whiskey.

THE COURT: Was this the first time he mentioned Mr. Houston?

THE WITNESS: No, sir, he mentioned the name on prior occasions, but this was the first time he actually told us anything specific.

THE COURT: I see. All right.

What happened as a result of his pointing out the various places where he said Mr. Houston was operating?

THE WITNESS: The only thing that happened there,

it started the investigation that led up to the time
[47] we set up surveillance. We talked to him several different occasions about the incident and couldn't find no way specifically to watch these places.

THE COURT: Now, as I understand you, so far as you were concerned, and so far as you knew from your fellow state officers, the only time this man had given you any information that proved to be accurate was when you arrested the other man and convicted him?

THE WITNESS: Yes, that is the only time he told me anything that proved to be accurate; yes, sir.

THE COURT: Well, anybody else that you were working with at the time?

THE WITNESS: I am not sure about that.

THE COURT: Then your next contact with him, as I understand, led to the surveillance which resulted in your seeking a search warrant and finally making this arrest. Is that right?

THE WITNESS: Yes, sir.

THE COURT: Have I got it straight?

THE WITNESS: Yes, sir.

THE COURT: All right, go ahead.

MR. SIMPSON: That's all, your Honor.

* * *

[49]. CROSS-EXAMINATION

BY MR. FRIAR:

* * *

[52] Q Now, with reference to your informant, Mr. Rhea, I believe that the informer had informed you that whiskey might be found or, as you testified, they thought might be in the shed behind the Houston house, 405 Welbourne Street. Wasn't that the information you received?

A No, sir, it wasn't. It was to the right rear of 405.

Q All right, sir, but on 405?

A I didn't say that, sir.

Q Why then did you—you were the affiant for the search warrant, weren't you?

A Yes, sir.

Q Why then in the search warrant did you say—

MR. SIMPSON: May the Court please, I again want to object.

THE COURT: What is the ground of your objection?

MR. SIMPSON: The ground, the Court has already ruled on the search warrant and he is going back to the—

THE COURT: Well, is this not cross-examination?

MR. SIMPSON: Well, sir, if he can use it for impeachment since the Court has thrown the—

THE COURT: That is what the Court is accept-

[53] ing it for, impeachment.

MR. FRIAR: That is the purpose, your Honor.

Q (By Mr. Friar) Mr. Rhea, if your information was that this was a shed behind 409 Welbourne Street across that vacant lot, if that is the shed you had in mind, why did you make affidavit before the United States Commissioner it was in a shed 35 yards to the right behind 405 Welbourne Street?

A I believe I told the U. S. Commissioner it was about 35 yards to the right rear of this residence, and I also believe I told him it was in back of a vacant lot.

Q Is that in the search warrant?

A No, sir, I don't guess it is.

Q Actually, Mr. Rhea, isn't there a small wooden shed at the back of 405 Welbourne Street, the Houston house, and while you all were there that night didn't you look in that shed?

A There was a garage back there, yes.

Q And a small shed?

A Built onto the garage.

Q There is a small shed in addition to the garage, isn't there, Mr. Rhea?

A Built onto the garage.

Q But it is a shed?

A Yes, sir.

[54] Q And when you were there, didn't you or some of the other officers look in that shed, looking for whiskey?

A Yes, sir.

Q Did you find any?

A No, sir.

Q And the only address used on the search warrant is 405 Welbourne Street, isn't it?

A Yes, sir.

* * *

[55] Q Mr. Rhea, what was the name of the man who was convicted on the basis—not the informer, but the man that was convicted on the basis of this information?

A J. C. Barnett.

Q So, it is your testimony that J. C. Barnett was convicted on that charge?

A No, sir, I said if it had come to trial and he pleaded guilty of that charge. I didn't say he come to trial and he had pleaded guilty on that charge.

Q And that was what you intended to convey to the Court?

A Yes, sir.

Q One other question. On the occasion of the arrest of these two gentlemen on March 11th, of course on that occasion prior to the arrest when you and Mr. Beeler and the other officers came into the driveway and saw these two men in a truck, on that occasion you hadn't seen anything until you got out of the truck there, had you?

A Got out of the car; no, sir.

Q Prior to that on that occasion you hadn't

[56] seen anything?

A No, sir, just radio message from the other agent.

* * *

REDIRECT EXAMINATION

BY MR. SIMPSON:

* * *

[57] THE COURT: Mr. Rhea, going back now to the first time that you received information from this informant which started this surveillance by you on the evening of March 7th, that is the time I am talking about?

THE WITNESS: Yes, sir.

THE COURT: From the time you got that information up until the time that you had arrested Mr. Simpson, did you see any moonshine whiskey?

THE WITNESS: No, sir.

THE COURT: Did you smell any?

THE WITNESS: No, sir.

THE COURT: You didn't taste any?

THE WITNESS: No, sir.

* * *

[58] CURTIS COMBS

was called as a witness by and on behalf of the Government, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SIMPSON:

* * *

[59] THE COURT: Do you have anybody that saw any whiskey or tasted or smelled it?

MR. SIMPSON: No, sir.

* * *

[61] Q How did you first participate in the investigation of these defendants, Mr. Combs?

A On March 6th, I contacted a reliable informer that there was illegal whiskey activity around and near 405 Welbourne Street.

THE COURT: Is that what he told you?

THE WITNESS: Yes, sir.

THE COURT: Used those words?

THE WITNESS: Not specifically.

THE COURT: Tell us what he said, please, sir.

THE WITNESS: He said he thought Poss and Spook—

THE COURT: Thought possibly Spook——

THE WITNESS: Poss and Spook.

Q (By Mr. Simpson) Who is Poss?

A Douglas Houston.

Q And who is Spook?

A John Simpson,—were concealing whiskey near their house in a shed.

* * *

[62] Q When was the first time you yourself first come in contact with this informant?

A About July, 1966.

Q What occurred with this particular informant then in July, 1966; how was your contact with him and the information relayed to you, sir?

A I was with Mr. Beeler and we contacted this man.

Q What did this informant tell you at that time, Mr. Combs?

A I don't remember the exact seizure at that time. We had made several seizures on his information.

THE COURT: Now, that is not enough, Mr. Combs. The Court can't let you substitute your judgment on whether or not this man is a proven reliable informant for the judgment of some judicial officer. We have to know the details.

You don't have to call names, but we have got to know the details.

You say—did I understand you to say you first met this man through Mr. Beeler?

THE WITNESS: Yes, sir.

THE COURT: And from that time on, tell us as best you can—I know you couldn't remember the dates
[63] but tell us the best you can of the occasions where he informed, and whether or not you found what he informed about to be that way.

THE WITNESS: Right recently before the arrest of Simpson—

THE COURT: Start back from the beginning now. You met this informant through Mr. Beeler and that was in July, 1966?

THE WITNESS: Yes, sir.

THE COURT: All right, when was your next contact with him?

THE WITNESS: A couple of months later.

THE COURT: What happened then; what information did he give you?

Do you mind if I do this, Mr. Simpson?

MR. SIMPSON: No, sir.

THE WITNESS: Received information of a still.

THE COURT: From him?

THE WITNESS: Yes, sir.

THE COURT: What did he tell you about it?

THE WITNESS: That there was a distillery located in a certain section of Unicoi County.

THE COURT: And did you investigate that?

THE WITNESS: Yes, sir.

[64] THE COURT: What happened?

THE WITNESS: We seized the distillery.

THE COURT: Was it where he said it would be?

THE WITNESS: Yes, sir.

THE COURT: Were there any arrests made?

THE WITNESS: No, we were observed.

THE COURT: What was your next dealings with him as an informant?

THE WITNESS: We made other arrests and other seizures.

THE COURT: Now, your next dealings with him as an informant, how long do you imagine it was after you made the Unicoi seizure?

THE WITNESS: About three months.

THE COURT: About three months. What was his information at that time?

THE WITNESS: That there would be an illegal whiskey drop at a certain point at a certain time, and named a certain party that would be involved in it.

THE COURT: What happened as a result, did you investigate it?

THE WITNESS: Yes, sir.

THE COURT: What happened as a result of
[65] your investigation?

THE WITNESS: We arrested the man, seized the whiskey, and the vehicle.

THE COURT: Was the man convicted?

THE WITNESS: It is pending.

THE COURT: Was this whiskey dropped where the man told you it would be?

THE WITNESS: Yes, sir.

THE COURT: At the time he told you it would be?

THE WITNESS: Yes, sir.

THE COURT: All right, what was the next contact you had with this informant?

THE WITNESS: That is about the last one until this arrest here, sir.

* * *

[66] THE COURT: Excuse me, Mr. Simpson, before we get away from this other point—

Did he tell you why he thought Poss and Spooks were concealing whiskey near their house and shed?

THE WITNESS: No, sir.

THE COURT: Did he say he had seen it?

THE WITNESS: No, sir.

THE COURT: He just said that and nothing else, gave you no further explanation?

THE WITNESS: That's all, sir, that I could determine out of his conversation.

THE COURT: So, if he knew, you don't know how he knew. Is that correct?

THE WITNESS: No, sir.

* * *

[69] Q (By Mr. Simpson) Now, as a result after they got in the truck and you observed them, did you make radio contact with any of your fellow officers?

A Yes, sir.

Q After making contact with them, what occurred?

A Well, the boys were in the truck and started to pull out and the car pulled in behind them and the truck moved forward and Agent Rhea and Agent Thacker—Agent Rhea was on the driver's side of the truck, and got the boys out of the truck. At that time I left my observation post and went over to the shed or truck.

* * *

[72] THE COURT: Before you start, Mr. Friar, let me ask two things for clarification here.

First of all, tell us again what happened just before you arrested these people and searched their truck and the out-buildings there? In other words, when your fellow officers, Mr. Beeler and the others came there, what

happened?

THE WITNESS: I was in the Professional
[73] Building looking down on them when the car pulled in and I seen they had Houston and Simpson under control and no danger of anybody getting hurt, so I left my post and went down to the scene.

THE COURT: Now, you were watching all of the time?

THE WITNESS: Yes, sir.

THE COURT: Did you see Mr. Simpson or Mr. Houston, or either of them violate the law in any way?

THE WITNESS: I couldn't swear they were violating the law.

THE COURT: Did you see anything that made you think they might be violating the law except the movements you observed for the last three or four days of surveillance of these cartons and sacks?

THE WITNESS: Every time a car would pass by or a party would get close on the street, they had some limbs cut off on the vacant lot there and they would hunker down behind them with the cases. On one occasion I saw Simpson set a case in the truck and a party came out of the house across the street and he just leaned up against the truck like he was standing there.

[74] THE COURT: Was there anything that you saw if you hadn't had any information at all that you feel would have justified you in arresting these people?

THE WITNESS: Starting from the 7th?

THE COURT: Yes, except for the information you had, was there anything you saw—let's go back a little bit further. You got the information on the 6th from the informer that he thought Poss and Spooks were concealing some whiskey near their house in a shed. That was on the 6th, wasn't it?

THE WITNESS: Yes, sir.

THE COURT: And is that the information you got?

THE WITNESS: Yes, sir.

THE COURT: From that time on, did you see anything that you feel would justify you in placing them under arrest for committing a crime in your presence?

THE WITNESS: On March 9th at 8:30 P.M. Simpson went into the shed and carried out an open top cardboard carton and I could see fruit jars sitting in the carton.

THE COURT: How could you tell they were
[75] fruit jars?

THE WITNESS: Light shining on them and I could see the lids.

THE COURT: You saw the lids?

THE WITNESS: Saw the fruit jars. They were sticking up a little.

THE COURT: You saw the neck and the lid?

THE WITNESS: I was looking down on the box.

THE COURT: Well now, if you met a man on the street without any information, met a man on the street and he had a carton in his hand and you saw fruit jars, and you saw the lids, and the necks of the jars, would you arrest him for that?

THE WITNESS: I would take a pretty good look to see what he had in that. If it looked like whiskey, I would check it out.

THE COURT: Suppose you didn't see any more than you saw on this occasion, would you just arrest anybody?

THE WITNESS: I wouldn't walk up and arrest him unless a lot of suspicious activity there.

THE COURT: And you think you can just arrest a person on suspicion?

THE WITNESS: No, sir.

* * *

[77] CROSS-EXAMINATION

BY MR. FRIAR:

Q Mr. Combs, just two or three questions, sir. First of all, with reference to your experiences with the informer, you have testified that there was an occasion he gave you some information about an automobile's movement, and as a result of that you made an arrest?

A Yes, sir.

Q Is the name of that man who was arrested J. C. Barnett?

A Yes, sir.

Q And isn't it true, as a matter of fact, Mr. Combs, that J. C. Barnett's case arising out of that arrest to which you testified, is now pending in this court and the man is represented by Senator Dugger, and that case is still pending in this very court. Isn't that true?

A Yes, sir.

[78] Q So if Mr. Rhea or any other person testified that Mr. Barnett had pled guilty as a result of that arrest, he was in error, wasn't he?

A I don't know.

Q Well, Mr. Barnett's case as a result of the arrest coming to you from the informer has not been disposed of, has it?

A Not that I know of.

* * *

[79] Q You didn't, of course, participate in the actual arrest at all, did you?

A No, sir.

Q You were still in the building?

A Yes, sir.

* * *

[80] JAMES R. BEELER

was recalled as a witness by and on behalf of the Government, and having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HORDE:

* * *

[81] Q Tell us something about this informer that with regard to your contacts with him? You have been up in this area much longer than some of the other men who testified here. How long have you known this informer and received information from him?

A Approximately four years.

Q Now, during that four year period of time, tell approximately how many times he has given you reliable information?

THE COURT: Don't use the conclusionary term "reliable." Let's find out what information he gave, and then let the Court decide whether or not it was reliable.

MR. HORDE: If the Court please, I wanted to know the approximate number of times, and then we will go into that.

THE COURT: All right.

Q (By Mr. Horde) Could you give us the approximate number of times he has given us information which

[82] you found to be reliable during that four year period of time?

A Without specifically checking the records, I would say approximately ten different occasions.

Q All right now, would you cite as many of those you can recall without giving names, following the rules the

Court has given us before?

A Well, the majority of information has been on location of distilleries.

Q Have you found distilleries or stills?

A Yes, sir, we have.

Q Each time he gave you that information?

A Yes, sir.

Q Do you recall—the Court may want further detail on this, Mr. Beeler, but do you remember the arrest of Mr. Barnett, I believe somebody said?

A Yes, sir.

Q Were you aware of that?

A Yes, sir.

Q Are you aware of any other arrest that has been made of individuals as result of information from this—

A Only one other which is, the best I can recall, was two years ago.

Q Do you recall the name in that case?

A No, sir, I don't.

[83] Q Was the individual arrested?

A Yes, sir.

Q Did he plead guilty or was he convicted?

A I believe he pled guilty here in this court.

Q In Federal Court here?

A Yes, sir.

Q And that takes care of about two times. You mentioned approximately some ten times.

THE COURT: Mr. Horde, this won't quite do. I wish we could come to an understanding on what the requirements are. What we are trying to get at is to keep law enforcement officers, who have a duty to perform, from also performing the judicial function of deciding whether or not a person is a proven reliable informant.

MR. HORDE: I appreciate that.

THE COURT: If you will just give facts. I recognize Mr. Beeler could not remember over a four year period every time, but times you can remember, Mr. Beeler, where this particular informer said so and so is violating the law, tell us what he said; whether you investigated; and, if you did investigate, what you found.

A On one occasion I talked to the informer and he said a certain party would drop whiskey at an ad-
[84] dress in Johnson City, Tennessee. We went to investigate this incident.

THE COURT: Did he tell you when?

THE WITNESS: Yes, he gave us the specific time, approximate time to be there, and we had ourselves stationed, and had radio communication, and just before the drop was to be made, we were caught.

THE COURT: You mean you were observed by those you were observing?

THE WITNESS: Yes, sir, a person walked out into the bushes and caught me or found me and immediately it was all over.

THE COURT: All right.

A (Continued) On another occasion——

THE COURT: He had you under surveillance?

THE WITNESS: Yes, sir.

MR. FRIAR: Case of Foxes eating the Foxes:

A (Continued) On another occasion he specifically gave us information of a distillery located in what we call Siota section of Unicoi County. We parked our car some distance, thought we were safe, and there again as we approached the distillery, we were observed by the re-
ported operator and, of course, again he was too
[85] far away from the distillery and we didn't arrest him.

* * *

[89] THE COURT: What I am trying to find out is, as to any of the information out of which this case arose, is this man—has he been paid or is he going to be paid?

THE WITNESS: Well, may I try to explain to the Court—

THE COURT: Yes, sir.

THE WITNESS: He has received a lump sum of money, but it has not been specifically for this case.

THE COURT: But for a series of information?

THE WITNESS: Yes, sir. In other words, covering approximately three months.

THE COURT: Let me ask you again, Mr. Beeler. I am still confused here. Did you see these men do anything before these two State officers arrested the defendants that you considered a crime being committed in your presence?

THE WITNESS: Not in my presence; no, sir.

* * *

[91] THE COURT: That is—did you go there to serve that search warrant or did you go up there to find out whether or not there was whiskey in that truck?

THE WITNESS: I went to serve that search warrant.

THE COURT: Did you serve the search warrant?

THE WITNESS: I did.

THE COURT: How did you serve it?

THE WITNESS: Immediately we placed the defendants under arrest and someone—I took Mr. Houston off to the side and somebody brought Mr. Simpson over and I told Mr. Houston that I had a search warrant and as soon as we had finished the search that I would give him a copy of the warrant.

THE COURT: You didn't read it to him?

THE WITNESS: No, sir, just told him we had a federal warrant.

[92] THE COURT: And you had actually already pretty well made your search of the truck at that time?

THE WITNESS: No, sir, hadn't anybody done any searching that I know of.

THE COURT: Now, Mr. Beeler, did you then go there for the purpose of making an exploratory search to see whether or not there was any whiskey there or did you go there for the purpose of serving the search warrant which you had every reason to believe was valid, and which I did too when I first saw it, or did you go there because you had probable cause to believe that the law was then being violated?

THE WITNESS: No, sir, so far as I was concerned, I was going to serve on that search warrant. I put it in my pocket and told him we had a Federal warrant. As soon as I could, after we had them under arrest—a few minutes elapsed due to the fact one man, Simpson, made an attempt to get out of the truck and the truck was moving at the time, and in my experience you either have to settle them down right then or you have trouble. During this melee other people became involved, people

[93] who stated we had no damn business to be there to start off with, and we were trying to get that calmed down to tell them we were Federal officers; that we had a Federal warrant, if they owned the property then we would serve it on them, and I would say it was approximately three to five minutes before I actually got to the point where I could get Douglas off to the side and show him and tell him I would give him a copy of the warrant after we found, or if we found anything. I believe I made the statement that way.

* * *

[95] A Yes, sir, he said "The cases are in the truck; they are now getting in. Go." When he said, "Go," we immediately, I in one car—we had the area surrounded, two cars in two blocks. I was [96] to lead the raid in because I had the search warrant. I went into the driveway first.

* * *

[97] CROSS-EXAMINATION

BY MR. FRIAR:

* * *

Q On this informer, I want to ask you one or two questions. Has he also been known to you to participate to some degree in the whiskey business?

A On occasions, yes, sir.

Q He also has the reputation with you as being in the whiskey business?

A Yes, sir.

* * *

[100] THE COURT: I think you have already gone so far that you have lost us, Mr. Horde.

MR. HORDE: I haven't lost Mr. Beeler, or at least I hope not.

THE COURT: At the same time you have assumed one fact that is not in evidence. You asked him to assume that this informer was reliable.

MR. HORDE: True.

[101] THE COURT: And this is a conclusion the officer cannot make.

MR. HORDE: I asked him to assume this.

THE COURT: Go ahead and complete your question. I will overrule it.

MR. HORDE: You say you will overrule it.

THE COURT: I will not let you put the question to him and ask his opinion. If you are trying to qualify him as an expert in the law of search and seizure, the Court has a very high regard for Mr. Beeler, but—

MR. HORDE: No, I don't want to do that as search and seizure.

THE COURT: What are you getting at? Maybe we can save some time.

MR. HORDE: I wanted to ask the question, based on that, on this past information, which he had here, would he have any doubt in his mind there was a violation, as an experienced officer, being conducted there in his presence?

MR. FRIAR: If your Honor please, I object to the question that the United States Attorney has proved this witness as being an experienced investigator, but has not qualified him as a judge.

[102] To answer this question would require him to be the Judge.

THE COURT: That's right. You are really asking him to be an expert and express an opinion on the law of search and seizure and arrest without a warrant, and things of that sort. Objection sustained.

* * *

[107] THE COURT: Let the Court say, of course we have a situation here where there is no question the fruits of the search proved to be a considerable quantity of contraband whiskey, but I think we will all agree the Supreme Court made it very clear that what is found as a result of a search does not validate an otherwise invalid search.

I think it is very clearly established without dispute that both of these defendants are moonshiners, by reputation; the officers knew this. It is their business to know it.

I think it has been established that they received from a paid informer information, but one of the serious questions in this lawsuit is whether or not this man, who Mr. Beeler says is also a dealer, who is a moonshiner himself, that he is informing on a potential competitor.

* * *

THE COURT: The Court hasn't had that particular thing. I know that someone pointed out you can't very well get the pastor of the St. Matthews Methodist Church — I use him because he is my Pastor — to go out and be an undercover man or inform on people, although it
[108] is the duty of any citizen to call attention to violations of the law, but unless this information was in the possession of these officers, regardless of how much suspicion they might have of these men because of their reputation, they could not have done anything. They couldn't have got the search warrant. They couldn't have gotten the arrest warrant. They couldn't have made the search on probable cause without a search warrant.

Now, you have to go one step further. This informer must be reliable.

There was a time when the courts seemed to say you can't operate on hearsay information. The Supreme Court in the Jones case, I believe it was, said, "Oh, yes, you can too, provided that hearsay information is accredited."

Then following the Jones case, the feeling was that means that in order to confirm what the informer has said, the affiant himself must see, hear, smell, taste, feel something, and if that is done, and if it confirms

what the informer said, then putting two together, then you can get a search warrant on that basis.

But there are other ways of accrediting hearsay information of an informer. One of them is what we
[109] are dealing with here today. If he goes before a Judge or Commissioner and says, "I have got information from a reliable person that Wilson Horde has a stolen automobile in his garage," then the Commissioner or Judge can say, "Just how reliable is this informer? Mr. Horde is a prominent person here and he—you have no right to go down there and be searching his property and invading his privacy unless you know what you are talking about. Just how reliable is this man?"

Well, he can say, "I have kept lists here and seventeen times this man has given me information and sixteen times I have found it to be exactly correct, what he said." To me that accredits the hearsay information provided by the informer, but we do have a serious question here as to the reliability of this particular informant.

* * *

[110] MR. FRIAR: No, your Honor. I know some good men from there too. Let's move on to something else.

Very quickly, I am not going to take a lot of the Court's time and not going to try to read any law or go into great detail about the thing, but two or three things, very quickly.

First of all, I want to take one second and talk about the use of the warrant and going back to the warrant. Mr. Beeler's testimony, I think, is as fair and honest and straight down the line as can be, and I have the greatest respect for Mr. Beeler, believing anything he says, and did today, and on that return, on the warrant, he says he confiscated this whiskey in this truck, and so forth, pur-

suant to the warrant, said again today he did it pursuant to the warrant. He said he went there to serve the warrant. He didn't go there because he thought there was probable cause or believed there was probable cause an offense was being committed; he went to serve the warrant.

It seems to me for the Government to take the position contrary to its own witness in this regard is sort of like a drowning man deciding to take swimming lessons.

[111] It is too late to take the swimming lessons.

The Government is committed by its own witness and face of return on the warrant, and this Court ruled the warrant is invalid. It seems to me the Government—the door is closed on their using the fruits of this forbidden tree.

With reference to this other matter, and particularly with reference to Beck versus Ohio, it seems to me that none of the tests have been met as laid down by the court in Beck versus Ohio.

The Court there says, "The constitutional validity of the search in this case must depend on the constitutional validity of the petitioner's arrest." Then the Court said—and I think this is exactly the situation we have today—"In complete contrast the record in this case does not contain a single objective fact to support a belief by the officer that petitioner was engaged in criminal activity at the time they arrested him."

I think that is not only this record, it is unanimously this record, what every witness has said.

THE COURT: What about all of these suspicious activities they have been noticing for four days, or five

[112] days?

MR. FRIAR: If your Honor please, the Court, it seems to me, said in the Beck case, and otherwise, they can't go on suspicion alone, that there has to be more than

suspicion alone. And, certainly, carrying heavy cartons from a woodshed to a truck is not a criminal activity per se and does not in itself constitute a criminal act, and none of the officers who participated in the arrest had seen anything on this occasion; not any one of them had seen anything. So they were coming on the basis of radio message, and I think it gets back there to the fundamental situation which all defense lawyers use and are familiar with, and relied on and courts upheld with reference to drunk driving cases. If an officer gets information that so and so is drunk, the car is weaving, and so forth, he must see some offense himself before conviction can be sustained. He can't go and make a lawful arrest on the basis of some information.

With reference to the informer, I think there is no way that the testimony, the information of that informer—I agree with the Court, and I want to talk about that because I think it is established his reliability is considerably in question in this record, but what he told these officers is about as weak as anything possibly could be.

[113]

The witness Rhea said he told him that he thought—and the witness Combs said that he told him he thought, so that the informer had no information. Not only did these officers not have any reliable information, but they had no reason to believe other than this informer, which——

THE COURT: If that is true, that puts the judicial function in the informer, not even in the officer, doesn't it?

MR. FRIAR: That is exactly right, your Honor. And the informer, according to this record, had nothing to go on.

I do want to read two brief things. I said I was not going to burden the Court.

United States Supreme Court in Giordenello versus United States, 357 U.S. 487, "Common rumor or reported suspicion or even strong reason to suspect * * *" and I think that is the situation about the movements back and forth which might have given strong reason to suspect, but in connection with that, the Supreme Court says:

"Common rumor or reported suspicion or even
[114] strong reason to suspect is not adequate to support a warrant for arrest."

Now, one other thing I want to read and that is all. In the Beck case there is this one statement. Of course, that is the case relied on by the United States Government.

The Court said: "It is possible that an informer did in fact relate information to the police officer which constituted probable cause for Mr. Beck's arrest," — stronger than we have here — "but when the constitutional validity of that arrest was challenged," — as it has been in this case — "it was incumbent upon the prosecution to show with considerably more specificity than is shown in this case, what the informer actually said; why the officer thought the information was creditable. If subjective good faith alone were the test, the protection to the Fourth Amendment would evaporate and people would be secured in their person, houses and effects only in the discretion of the police." And then, of course, the Court reversed the conviction.

One final thing I want to say. Of course, these safeguards by the United States Supreme Court recognizes the

possibility that now and then in order to maintain
[115] the safeguards for the innocent, that a guilty person, or guilty persons may escape, but it is necessary to provide the safeguards and let these guilty ones, if there be such, * * * "and this Court is not being asked to judge the guilty or innocence of these defendants today—"

but in the event that these safeguards have been violated as to these two men in connection with this arrest, it seems to me this indictment ought to be dismissed and they ought to have their truck returned to them and be allowed to and pursue their own way.

MR. HORDE: May it please the Court, Mr. Simpson has handed me a case I want to call the Court's attention to, and I want to bring out one thing. Mr. Beeler definitely said the informer said positively that these people were in the whiskey business, not that he thought. Mr. Combs said he thought.

THE COURT: Mr. Combs and Mr. Rhea both said it, as I recall, that this informer said he thought they had, but Mr. Beeler was positive.

* * *

[121] Bear in mind that the burden has shifted from the movements with the voiding of the search warrant to the prosecution and you have got to carry the burden of showing that these officers were properly on and near the premises of defendant Houston, and were properly making these arrests and search.

* * *

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS ON TRIAL

(June 21, 1967)

* * *

[5] MR. SIMPSON: Your Honor, Mr. Friar had written me wanting the identity of this informer. This I will strongly resist.

MR. FRIAR: I might say on that point, it was my battle plan to bring up that matter at the conclusion of the Government's proof if the informer had not been made available. I have notified the United States Attorney's office that I would like an opportunity to cross-examine him. Unless the Court suggests some other procedure, I will bring that matter up at the conclusion of the Government's proof.

As I interpret the Court's ruling on the Motion
[6] or otherwise, the information supplied by the informer is one of the most important points, the reliability, and there are some cases and some questions about whether or not informers should be made available.

For instance, I am sure both Mr. Simpson and the Court are familiar with the decision in the McCray case where four of the judges strongly say the informant should have been made available for cross-examination.

I feel in this case where the informer himself is such a crucial character we would be entitled to have his identity made known and to cross-examine him.

I think too, if your Honor please, there are so many questions raised about this informer. For instance, his information was not even accurate. He said the contraband was at 405 Welbourne Street and there was nothing there.

Another factor, which I think is important, is that there is some indication from the Government's witnesses that the informant is also in the whiskey business, so I would like an opportunity to inquire concerning his motive.

THE COURT: Does not all this go to the pro-
[7] priety of issuing a search warrant rather than the trial itself?

MR. FRIAR: If your Honor please, I understood the Court on the question of probable cause, that the officers

based only what they saw, combined with their information from the informant, making a case of probable cause.

THE COURT: For issuance of that warrant.

MR. FRIAR: No, I felt for the arrest.

THE COURT: That invalidated the search warrant.

MR. FRIAR: Yes, and the Court, as I interpret the Court's opinion, says, that with just what they saw it very likely would not have been a legal arrest, but with what they saw, coupled with the information from the informer justified the arrest and, therefore, justified the search.

It seems to me the informer is a most critical part of this situation.

THE COURT: We will take this up in more detail at the conclusion of the Government's case, and also in the absence of the jury.

MR. FRIAR: Yes, I have a lot of law.

* * *

[19] CURTIS COMBS

was called as a witness by and on behalf of the plaintiff, and after having been first duly sworn, was examined and testified as follows:

* * *

[40] CROSS-EXAMINATION

BY MR. FRIAR:

* * *

[41] Q So the other officers in the other automobile were already on the scene and already had these two defendants in custody when you got there?

A Yes, sir.

* * *

[47] **ROBERT RHEA**

was called as a witness by and on behalf of the plaintiff, and after having been first duly sworn, was examined and testified as follows:

* * *

[55] CROSS-EXAMINATION

BY MR. FRIAR:

Q Mr. Rhea, the automobile you rode in up to the Welbourne Street address, where were you sitting in the car?

A On the passenger side of the right front.

Q And who was driving the car?

A Mr. Beeler.

Q Is he a Federal officer or State officer?

A He is a Federal officer.

Q And Mr. Thacker, where was he riding?

A He was in the back on the back left.

Q Behind the driver?

A Yes, sir.

Q Is he a State officer?

A Yes, sir, State officer.

Q And Mr. Lindsey, he was in the rear on the right?

A Yes, sir.

Q Federal officer or State officer?

A Federal officer.

* * *

[56] Q Driven by Mr. Beeler?

A Yes, sir.

* * *

[57] **JAMES R. BEELER**

was called as a witness by and on behalf of the plaintiff, and after having been first duly sworn, was examined and testified as follows:

* * *

[67] CROSS-EXAMINATION

BY MR. FRIAR:

* * *

[68] Q (By Mr. Friar) Mr. Beeler, I believe you were the driver of the automobile that pulled into the driveway there first on this occasion?

A Yes, sir.

Q And who owned the automobile?

A The U. S. Government—I beg your pardon, the A.B.C. Department. We were driving one of their cars.

Q I believe you testified that they had given you the warrant?

A Yes, sir.

Q And you were driving the car?

A Yes, sir.

Q As a matter of fact, you were in charge of the exhibition or operation, weren't you?

A Yes, sir.

Q You were the senior officer and in charge of it?

A Yes, sir.

Q Now, Mr. Beeler, when you arrived at the scene you testified that the other three officers got out. Didn't you get out too?

A Yes, sir, as soon as I could stop the car and put the brake on, yes, sir.

[69] Q Just about the time they hit the dirt, you were getting out of the car too?

A Yes, sir.

Q So that all four of you approached the vehicle about or approximately the same time, or nearly the same time?

A Yes, sir.

Q I want to ask you, Mr. Beeler, if it isn't true that at the time you were stopping or approaching, or getting

out of the vehicle and approaching the truck, if you or some other person in the car didn't say, in a voice loud enough to be heard, directed toward the vehicle, if you didn't call out "Federal officers; Federal officers"?

A Yes, sir.

Q Were you the one, or were you one of the ones who said that?

A I was one of the ones. It was repeated more than once.

Q Sir?

A It was repeated more than once.

Q And then you were saying that, and others in the vehicle were also saying that, weren't they?

A Yes, sir.

Q You were calling out in the direction of the vehicle and in the direction of these two defendants "Federal
[70] officers; Federal officers." Isn't that true?

A Yes, sir.

Q And Mr. Beeler, isn't it also true that after these two men were in custody, or under arrest, if they didn't inquire of you if you were Federal officers?

A I don't recall that they inquired. Mr. Houston knows me by sight, and knows who I am and in what capacity I am.

* * *

[71] Q Now then, Mr. Beeler, as you approached the vehicle after the four of you had gotten out of the car, isn't it true you told these two men they were under arrest?

A Yes, sir.

Q And then proceeded to search them, or have them searched, and search the premises?

A Yes, sir.

* * *

REDIRECT EXAMINATION

BY MR. SIMPSON:

Q Mr. Beeler, at the time the defendants were placed under arrest, did you or other officers advise them of their Constitutional rights?

A They were.

[72] Q What did you advise them?

A I advised them that they didn't have to make any statement, and any statement they did make could be used against them; that they had a right to counsel, and if they didn't have funds to provide counsel, the Government would provide it for them; that they also had a right to have the counsel present at any time they made any statement, and any statement they made they could stop making it any time they wished. I also had them sign a form, one of the defendants signed a form of those rights.

Q Which one of the defendants?

A Mr. Houston.

Q Did you advise them anything they said could be used against them?

A Yes, sir.

Q As a result of advising them did they make any statements to you?

A No, sir.

* * *

RECROSS-EXAMINATION

BY MR. FRIAR:

Q Mr. Beeler, as I understand, you advised them of their Constitutional rights, which was proper and

[73] commendable, immediately after you told them they were under arrest?

A Well, I wouldn't call it exactly immediately, Mr.

Friar. As soon as things were settled down, I advised them. We were having a little trouble there at the scene. Then I again advised them at the Police Department and that is where the form was signed, and that would be some thirty to thirty-five minutes after this thing got started.

Q By "again advised," do you mean again advised them of their Constitutional rights?

A Yes, sir, and showed them the forms.

MR. FRIAR: No further questions.

THE COURT: I think in fairness to the defendants, you ought to state what the nature of the difficulty was there at the scene. You said there was some difficulty.

THE WITNESS: At the time we drove into the property on to this vacant lot there was quite a bit of excitement going on due to the fact several people were running around, and three disinterested people who lived in the neighborhood came upon the scene and wanted to know who we were, and we informed them we were Federal Officers. One of them got right indignant and stated we had no right to be on that property, and finally he was advised that [74] if he owned the property, we would be glad to let him see the warrant we had, and so forth. Then I turned and asked Mr. Houston if he didn't know these people, and he said, "Yes." I said, "Douglas, why don't you tell them to move on; that we are Federal Officers and we are not going to harm you; that you will be given proper chance to make bond and come on back home." He said, well, it wasn't nothing to him. Then I asked Mr. Simpson if he would. He said, "Yes, I think they ought to move on and mind their own business." Mr. Simpson then called these three young boys over and told them, said, "Now, there is nobody going to get hurt. The best thing for you all to do is go on back across the street and mind your own business," which they did.

* * *

[75] **W. H. LINDSEY, JR.**

was called as a witness by and on behalf of the plaintiff, and after having been first duly sworn, was examined and testified as follows:

* * *

[79] CROSS-EXAMINATION

BY MR. FRIAR:

[80] Q Isn't it true, Mr. Lindsey, that you pulled your gun, drew your weapon and held it on Mr. Simpson?

A No, sir, it wasn't. That is not true. I did have my gun.

Q Did you draw it?

A Yes, I did. I had it out.

Q Did you not ever —what purpose did you have it out for; what did you do with it?

A As the truck began to move off, I thought at that time it was to the best interest for the safety of all persons, including the defendants, to have my gun out.

Q At what point then did you take your gun out?

A As the truck begin to move off forward.

Q As it moved forward?

[81] A Yes, sir.

Q And how long did you keep the gun out?

A I kept it out until the two defendants were under arrest and under control.

Q So that at all times from the point when you first lit on the ground out of the car until they were safely in custody, your open gun was in your hand?

A It was in my hand, yes, sir.

Q Did anybody else draw a gun or draw a weapon?

A I don't know about that.

Q Did you see any other gun or any other weapon?

A No, I didn't, not out.

* * *

[83] THE COURT: Mr. Friar, did you have something to bring up with the Court?

MR. FRIAR: Yes, if your Honor please.

I wanted to bring to the attention of the Court
[84] the fact that I have in writing requested that the United States Attorney furnish at least for purposes of cross-examination, make available as a witness the informer in this case.

The reason for this is, and I am not going further into the matter since I put it in the record this morning, but just wanted to say the question of reliability of the informer, and the informer's previous relationship with the officers, it seems to me to be extremely critical and crucial part of this case.

The Supreme Court decisions and the decisions of the District Courts and Federal Courts of Appeal seem to be in a sort of a state of flux right now with reference to this entire field, I think. It has been very well said this is the most active branch of the law in America today, the question of search and seizure, and rights of defendants, and so forth, at the time of arrest or thereabouts.

I wanted to read just three or four sentences from McCray, with which I think the Court is familiar, but want to read these because I want to address myself to them, in the McCray case.

There were four members of the Supreme Court who dissented from McCray, and among other things
[85] they said:

"There is no way to determine the reliability

of Old Reliable * * "—and "Old Reliable" is capitalized, making it a name here—"There is no way to determine the reliability of Old Reliable, the informer, unless he is produced at the trial and cross-examined. Unless he is produced, the Fourth Amendment is entrusted to the tender mercies of the police."

One other sentence from that dissent, the Court then says: "We should also be mindful that 'disclosure', rather than suppression of relevant materials ordinarily promotes the proper administration of criminal justice." Then the Court quotes again Dennis v. United States, 384 U.S. 855.

I wanted to say, and, of course, I realize that I am, in that case, which is the most recent one on this subject that I have run across, although there is a great deal of interest in the subject, as I said, for instance, the Northwestern University of Law Review, the March Issue, 1967, has an article entitled "The Informer Privilege," which discusses this entire subject. The April Issue of the Journal of Criminal Law and Criminology—which is a recognized publication in legal circles as being
[86] one of some authority, an opinionated publication, but one with some substance, also has an article on the same subject.

It just seems to me that in this case, since the manner of informer is so crucial, that the Court might give some consideration to the fact that he ought to be produced.

There is a case before the United States Supreme Court at the present time. I say for the record that I checked with the Clerk of the United States Supreme Court yesterday to see if the case had been decided, and it has not, according to my information. This is a case of White versus New York, where this exact same question

is raised, and in the material that I have read, and familiar with, there is some feeling, and I might say some considerable hope in some legal minds, that the Supreme Court will re-examine the position of McCray, and among other things make the Government make these informers available for cross-examination where it is a critical point.

I think perhaps the final decision in the White case versus New York would have considerable to do with this particular case before the Court today.

I want to say one other thing, which is by the
[87] way of summarization, that the informant or informer here is so suspect because—and let me say this—there is some indication in some cases the Court thinks the informer ought to be made available in order to establish the fact that there is an informer.

Some of the courts have said, the District Courts, not the Supreme Court of the United States, that there is some reason to believe not that the police officers perjured themselves, but that this is just a custom they developed, to say "from a reliable informer," because they themselves have the information.

So that the existence of an informer—and I don't challenge the existence of an informer in this case, only raise the question, and that is one of the matters I am discussing—that the existence of an informer is a legitimate question, but in this case there is some indication that this informer, if he does exist, is himself in the whiskey business, and a suspect.

I want to ask the Court at this time to require the Government to produce the informer and make him available as a witness for the Government, or make him available
to me so that I may call him as a witness for the
[88] purpose of examination.

THE COURT: First of all, let the Court say

it is the responsibility of every citizen to report violations of the law to the proper authorities. There is an increasing tendency on the part of our citizenship not to want to become involved by doing such a thing. On the other hand, it would be very unlikely that the pastor of one of the leading churches in Johnson City, or president of the Chamber of Commerce, or editor of the Press Chronicle would know about any kind of dealings on the part of defendants such as these in the illicit whiskey.

Now, the policy of the Government ordinarily is not to—policy of the courts rather ordinarily is not to require the Government to reveal the names of the informer, because, very obviously, if a person who is giving information to the Government knew that his name was going to be given to the persons arrested as a result, there would be more hesitancy to do so and the law enforcement would suffer to that extent.

The question of the reliability of the informer in this case, in the Court's opinion, does not present the type of critical issue that would be presented in other cases because there was for four days, as I recall, before
[89] the date of this raid, a surveillance, careful surveillance by two different officers of the premises of the defendant and the premises where the other defendant was busying himself doing something. These officers saw things that would tend to lend credence to the information that they had received, so the Court, assuming that the Government does not wish to voluntarily bring forth the name of the informer or the informer as a witness——

MR. SIMPSON: No, your Honor.

THE COURT: ——the Court would not require under the peculiar circumstances of this case, that the informers identity be revealed, or the informer produced for cross-examination.

Let the motion be denied.

* * *

[Caption Omitted]

MEMORANDUM OPINION AND ORDER

(Filed June 16, 1967)

Having found and concluded that the warrant under which federal revenue agents searched the vehicle and premises of the defendant Houston was void, see memorandum opinion and order of April 21, 1967, the Court received evidence on issues of fact necessary to a further and final decision, Rule 41(e), Federal Rules of Criminal Procedure, on the question of whether the prosecution may justify the defendants' arrests and search of the said vehicle and premises as incidents thereto without relying on the authority of the search warrant. *Cf. Giordenello v. United States* (1958), 357 U.S. 480, 488, 78 S. Ct. 1245, 1251, 2 L. Ed. (2d) 1503; *United States v. Rabinowitz* (1950), 339 U.S. 56, 70 S. Ct. 430, 432, 94 L. Ed. 653.

The investigation leading to the arrests of the defendants and the search of the aforementioned premises and truck thereon was a joint venture of federal and state alcohol tax revenue agents. Federal Agent James R. Beeler received information prior to March 6, 1967 that the defendants were engaged in the illegal traffic of tax-unpaid whiskey. He communicated this information to his fellow agents and to agents of the Tennessee Alcohol Beverage Commission.

On the aforesaid date, state revenue agent Combs received information from a proven reliable[1] informant that

[1] The credibility of this information was judged by Agent Combs on the basis of information previously given by the same informer in prior investigations, which had afterward proven to be accurate as represented by the informant.

the defendants were then concealing illegal whiskey near the Houston residence in a certain shed. This constituted a felony under both Federal and Tennessee law, and both the federal agents, 26 U.S.C. §7608 (b) (2) (B), and the Tennessee agents, T.C.A. 40-803, had therefrom probable cause to arrest the defendants. Instead of arresting the defendants immediately, however, the two sets of agents cooperated in carrying on a surveillance of the suspected premises at about dusk on four consecutive days.

During this surveillance, the defendants were observed by the officers removing from the shed and into an old model GMC truck obviously heavy cardboard cartons, bearing the inscription "Ball Mason Jars."[2a] On one occasion a state agent saw the lid and top of this type of glass jar within one of the cartons being thus transported. On another occasion during the surveillance, the agents saw an automobile driven into, and parked on, a vacant lot adjacent to the Houston property, from which automobile 18 such cartons and a quantity of heavy paper bags[2b] were unloaded by the defendants and the unidentified driver of the visiting vehicle, and transported into the shed. On yet another occasion, when a person or persons appeared on the front porch of a dwelling across the street from the Houston residence, the officers saw the defendants conceal surreptiously similar cartons under dead tree limbs on the vacant lot. Finally, on the evening of the raid, state agent Combs witnessed the defendants removing similar cartons with the same inscriptions and another quantity of heavy paper bags from the shed and placing

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[2] Ball Mason jars are the customary containers of moonshine whiskey in this area, and they are protected customarily from breakage by being packed in heavy paper bags.

them in the truck aforesaid. State Agent Combs relayed this information to other agents in the vicinity by radio, and the raid herein ensued immediately.

When the agents intruded on the Houston property, armed with a supposedly valid (but void) federal search warrant and announced the official purpose of the intrusion, the defendants undertook to drive the truck toward the rear of the Houston premises. The defendants were then arrested, respectively, by respective state agents and caused to disembark from the truck. Further performance of the officers' duties were interrupted momentarily by the threatened interference of youngsters who appeared on the scene. The defendants assisted, commendably, in restoring calm, and federal agents then completed the search of the vehicle and the shed. Quantities of tax-unpaid whiskey were found in both the truck and the shed, and the contraband and the truck were confiscated by the officers.

" * * * Upon the basis of those circumstances, * * * [including] * * * the officers' personal observations of the [defendants], the court [is] fully justified in holding that at the time the [state] officers made the arrest, 'the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [defendants] had committed or [were] committing an offense.' * * * " *McCray v. Illinois* (1967), ... U.S. ..., 87 S. Ct. ..., 18 L. Ed. (2d) 62, 67 [2], distinguishing *Beck v. Ohio* (1964), 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. (2d) 142. Only unreasonable searches and seizures are interdicted by the Fourth Amendment to the federal Constitution. *Harris v. United States* (1947), 331 U.S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399, 1405 (headnote 4),

rehearing denied (1947), 331 U.S. 867, 67 S. Ct. 1527, 91 L. Ed. 1871.

" * * * Under Tennessee law an officer is authorized to make an arrest without a warrant upon 'a charge made, upon reasonable cause, of the commission of a felony by the person[s] arrested. T.C.A. §40-803 (4).' * * *" *United States v. Masini*, C.A. 6th (1966), 358 F. (2d) 100, 102 [1, 2]. It matters not that the subsequent search by the federal agents was incidental to the lawful arrests by state agents. " * * * [P]robable cause is to be evaluated by the courts on the basis of the collective information of the [law endorcement officers] rather than that of only the officer[s] who * * * [perform] * * * the act[s] of arresting * * *." *Smith v. United States*, C.A. D.C. (1966), 358 F. (2d) 833, 835 [1, 2]. The federal agents had information which constituted probable cause for them to believe that the defendants had committed the offense proscribed by 26 U.S.C. §7302, *cf. Sirimarco v. United States*, C.A. 10th (1963), 315 F. (2d) 699, 701 [2, 3], [4, 5], 702 [6-8], certiorari denied (1963), 374 U.S. 807, 83 S. Ct. 1696, 10 L. Ed. (2d) 1032; and they had a duty to confiscate the contraband, 18 U.S.C. §3615; 26 U.S.C. §7301 (e). See also *United States v. Botsch*, C.A. 2nd (1966), 364 F. (2d) 542 and *Smith v. United States*, *supra*.

The principal thrust of the defendants' contention is that the existence of the search warrant and the lack of an arrest warrant demonstrate conclusively that the agents intruded on the Houston property to execute the search warrant rather than to arrest the defendants and cannot justify the arrests, search and seizure on the concomitant authority of the agents to arrest without a warrant on probable cause and to search as an incident to a valid arrest.

This contention lacks merit. *Williams v. United States*, C.A. 9th (1960), 273 F. (2d) 781, 789 [1], 791 [4], 794 [4].[3] " * * * The fact that the officers intended when they entered the premises to make a search of the premises for [contraband] would not make the arrest[s] illegal, if when they entered they were justified in so doing for the purpose of making the arrest[s] which they in fact did make. * * *" *Donahue v. United States*, C.A. 9th (1932), 56 F. (2d) 94, 97 [4].[4] The end object of these agents was the apprehension of the defendants in criminality, and the agents could accomplish this objective by any lawful means.

Accordingly, the motion of the defendants to suppress the evidence obtained in the search herein hereby is

DENIED.

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3 See also **Hagans v. United States**, C.A. 5th (1963), 315 F. (2d) 67, 69 [3], certiorari denied (1963), 375 U.S. 826, 84 S. Ct. 68, 22 L. Ed. (2d) 58; **United States v. Botsch**, supra, 364 F. (2d) at 548-549; **United States v. White**, C.A. 4th (1965), 342 F. (2d) 379, 381 [2], [3, 4].

4 **Contra:** see dissent, 56 F. (2d) 97-99

ENTER:

/s/ C. G. Neese
United States District Judge

[Caption Omitted]

NOTICE OF APPEAL

(Filed June 23, 1967)

Notice is hereby given that Douglas Houston and John Lewis Simpson, defendants above named, hereby appeal to the United States Court of Appeals for the Sixth Circuit from the order denying the defendant's motion to suppress evidence entered June 16, 1967, and from the verdict of guilty returned by the jury on June 21, 1967.

DATED: June 22, 1967.

/s/ G. Edward Frair
G. Edward Friar
Attorney for Defendants
1114 W. Clinch Avenue
Knoxville, Tennessee

CERTIFICATE

I, G. Edward Friar, certify that I have mailed a copy of the foregoing Notice to Mr. Robert Simpson, Assistant U. S. Attorney General.

/s/ G. Edward Friar
G. Edward Friar

[Caption Omitted]

ORDER

(Filed July 24, 1967)

In this cause, upon motion of the defendants, and for good cause shown, it is ordered that the defendants be granted an extension of fifty days from the date of the filing of the Notice of Appeals, within which to have the original papers and record certified to the Circuit Court of Appeals for the Sixth Circuit, thereby allowing defendants a total of ninety days from the Notice of Appeal for such certification and filing.

This ..... day of July, 1967.

C. G. NEESE
JUDGE

O.K.

.....
Assistant United States Attorney General

/s/ G. Edward Friar
Attorney for Defendants

[Caption Omitted]

NOTICE OF APPEAL

(Filed September 28, 1967)

Notice is hereby given that Douglas Houston and John Lewis Simpson, defendants above named, hereby appeal to the United States Court of Appeals for the Sixth Circuit from the Judgment entered September 21, 1967.

Dated: September ....., 1967.

.....
G. Edward Friar
Attorney for Defendants
1114 W. Clinch
Knoxville, Tennessee

CERTIFICATE

I, G. Edward Friar, Attorney for Defendants, certify that I have mailed a copy of the foregoing motion to Mr. Robert Simpson, Assistant U. S. District Attorney General.

.....
G. Edward Friar

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee v. DOUGLAS HOUSTON and JOHN LEWIS SIMPSON, Defendants-Appellants	NO. 18,219 FILED May 7, 1968

Before: WEICK, Chief Judge, and CELEBREZZE and PECK, Circuit Judges.

Defendants-appellants were convicted for having possession of certain distilled spirits in containers not bearing stamps evidencing tax payment in violation of 26 U.S.C. §§5205(a)(2) and 5604(a). In this appeal from such conviction defendants-appellants contend that the District Court erred in overruling their motion to suppress evidence, in permitting the appellee to rely on probable cause in making a search, and in not requiring the appellee to reveal the identity of its paid informer. We find the contentions to be without merit, and accordingly,

IT IS ORDERED that the judgments of the District Court be, and they hereby are, affirmed.

ENTERED BY ORDER OF THE COURT

/s/ Carl W. Reuss
Clerk

26 U.S.C.

§ 5205. Stamps

(a) Stamps for containers of distilled spirits.—

* * *

(2) Containers of other distilled spirits.—No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof is stamped by a stamp evidencing the determination of the tax or indicating compliance with the provisions of this chapter.

* * *

§ 5604. Penalties relating to stamps, marks, brands, and containers

(a) General.—Any person who shall—

(1) transport, possess, buy, sell, or transfer any distilled spirits, required to be stamped under the provisions of section 5205(a)(2), unless the immediate container thereof has affixed thereto a stamp as required by such section;

* * *

shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 9 1969
JOHN F. DAVIS, CLERK

No. 157

In the Supreme Court of the United States

OCTOBER TERM, 1968

DOUGLAS HOUSTON AND JOHN LEWIS SIMPSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
FRED M. VINSON, Jr.,
Assistant Attorney General,
PHILIP R. MONAHAN,
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Department of Justice,
Washington, D.C. 20530.

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313-089—68

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the district court (Pet. App. 17–20, 67–71) are not reported. Except to state its conclusion that the contentions of the petitioners were without merit (Pet. App. 75), the court of appeals wrote no opinion.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1968 (Pet. App. 75). The petition for a writ of certiorari was filed on June 4, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court properly ruled, after holding invalid the search warrant pursuant to which the contraband whiskey was seized, that the seizures were valid independently of the warrant.

2. Whether the government was required to divulge the identity of the informant whose information led to the investigation, arrests, and seizures, where the government agents verified the accuracy of the information through personal surveillance.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioners were convicted of possessing nontaxpaid whiskey, in violation of 26 U.S.C. 5205(a)(2) and 5604(a)(1) (Pet. App. 11, 13). On September 21, 1967, petitioner Houston was sentenced to five years' imprisonment and to pay a fine of $1,000 and petitioner Simpson was sentenced to one year's imprisonment and to pay a fine of $500 (Pet. App. 12).[1] The court of appeals affirmed (Pet. App. 75).

Shortly after 7 o'clock on the evening of March 11, 1967, petitioners were arrested for possessing nontaxpaid whiskey as they were backing a 1950 GMC pickup truck out of a driveway separating petitioner Houston's residence (located at 405 Welbourne Street, in Johnson City, Tennessee) from an adjacent vacant lot (No. 407), which was owned by a person not a

[1] Pursuant to 18 U.S.C. 4208(a)(2), it was directed that each petitioner should become eligible for parole at such time as the Board of Parole should deem appropriate (Pet. App. 12).

party to these proceedings (Pet. App. 22–24, 57–59; H. 7–8, 11–12, 90–91; Tr. 52–53).[2] The arresting officers were two agents of the Tennessee Alcoholic Beverage Commission (Robert Rhea and Ernest Thacker) and two federal Internal Revenue agents (James Beeler and William Lindsey), acting jointly (H. 25). The officers' information which led to the arrests is described below. Within a few minutes of the arrests 20½ gallons of nontaxpaid whiskey, packaged in half-gallon "Ball Mason" glass jars, were seized by the officers from the bed and cab of the truck (H. 8–9; Tr. 65). An additional 80¼ gallons were seized moments later from a shed located between 35 and 40 yards from the Houston residence, in the rear portion of a lot adjacent to, and on the opposite side of, the vacant lot next to the Houston residence. Petitioners were known to have had regular access to the shed during the preceding four days (see *infra*), and petitioner Houston had a key to the shed in his possession when he was arrested (H. 9–12; Tr. 66).

At the time of the arrests and seizures the officers had in their possession a federal search warrant, issued earlier that day, authorizing the search, for nontaxpaid whiskey, of the "Douglas Houston residence, 405 Welborne Street, * * * and adjacent premises, and particularly a white wood shed approximately thirty-five yards to the right rear of said residence" (Pet. App. 15; H. 37–38, 90–93). In a pre-trial pro-

[2] "H." refers to the transcript of the hearing on a pre-trial motion to suppress, held on April 21, 1967. "Tr." refers to the transcript of the trial proceedings.

ceeding to suppress the use of the seized whiskey as evidence, the district court held the search warrant invalid because the name of the affiant on whose affidavit it had been issued had, through a clerical error, been omitted from the face of the warrant (Pet. App. 17–20).[3] Following an evidentiary hearing, however, the court ruled that the arrests had been valid and the seizures lawful as reasonable incidents of the arrests, and therefore denied the motion to suppress (Pet. App. 67–71).

The relevant facts are not in dispute and may be summarized as follows:

The investigation which led to the arrests and seizures was a joint undertaking of the federal and State agencies involved (Pet. App. 67). On March 6, 1967, an informant of known reliability told State Agent Curtis Combs that he believed petitioners were concealing nontaxpaid whiskey in a shed near the house of petitioner Houston (H. 61–66, 74, 81–82).[4] Both petitioners had reputations as dealers in the contraband commodity (H. 22–23, 38–39, 70–71).[5] The agents

[3] Because it held the warrant defective on this ground, the court found it unnecessary to consider other challenges which had been made to the warrant's validity (Pet. App. 14–15, 20).

[4] In the period of some four years during which Federal Agent Beeler (through whom Combs had met the informant) had known him, the informant had, on approximately ten occasions, supplied information—relating principally to the locations of illicit stills—which proved to be correct (H. 62, 81–82).

[5] Agent Beeler, who had known Houston for ten years and Simpson for one year, testified that throughout the respective periods they had had the reputation of being both wholesalers and retailers of moonshine (H. 22–23). Agent Combs knew petitioners by reputation as being "associated in the whiskey business in a big way" (H. 70–71).

thereupon initiated a cooperative surveillance of the suspected premises, from the third floor of an office building located 30 feet from and to the rear of the yard of the Houston residence, at about dusk on five consecutive evenings (H. 29–37, 66–67).

At 6:55 p.m. on March 7, 1967, the first day of the surveillance, the agents observed petitioners go to a shed answering the description of the shed referred to in the warrant, unlock the door, enter, and carry out a number of cardboard cartons on the sides of which the words "Ball Mason Jars" were imprinted. They placed the cartons in a 1950 GMC pickup truck that was parked in the vacant lot next to the residence. Petitioner Simpson then removed from the shed and placed in the cab of the truck a large paper bag containing something which appeared to be heavy. After Houston had locked the shed door, both petitioners departed from the premises in the truck (H. 31–32, 35). "Ball Mason" fruit jars are the customary containers of moonshine whiskey in Eastern Tennessee and they are customarily protected from breakage by being packed in heavy paper bags (Pet. App. 68, n. 2; H. 23, 71).

On March 8, at 7:10 p.m., the agents saw petitioners again unlock and enter the shed. Each removed a similarly labeled cardboard carton which appeared to be heavy, placed it in the bed of the GMC truck, and departed in the truck. At 7:30 p.m. the two returned in the truck, unloaded some heavy and similarly marked cartons, and left again. At 8 p.m. they returned, loaded the cartons back into the truck, and departed (H. 32–34).

Similar activity was observed on the evenings of March 9 and 10 (H. 35–37, 74–75). In one instance, a carton which petitioner Simpson removed from the shed and placed in a parked automobile had an open top and the agents could see the glass lids of Mason jars in the carton (H. 36, 74–75). On another occasion, petitioners and the driver of a Ford automobile, which was driven into and parked on the vacant lot, unloaded 19 cartons and some paper bags from the vehicle. Petitioners later loaded four of the cartons into the GMC truck, in which they then departed (H. 37).

During the course of the foregoing activities of petitioners, the agents noticed that whenever an automobile passed by or a pedestrian approached on the street petitioners would "hunker down" with the cartons behind some tree limbs that lay in the vacant lot. On one occasion, when a person came out of a house on the other side of the street as petitioner Simpson was loading a case into the GMC truck, Simpson "just leaned up against the truck like he was standing there" (H. 73).

On the afternoon of March 11, 1967, State Agent Rhea, one of the surveillant officers, appeared before a United States Commissioner and executed an affidavit for a search warrant, based on his observations (H. 37–38, 52–53, 94).[6] The warrant to which we referred earlier was issued. At 6:55 p.m. Agent Combs, from the observation post from which the surveil-

[6] The affidavit is not contained among the record papers on file in the Clerk's office.

lances of the four prior evenings had been made, saw petitioners remove from the shed and place in the bed of the GMC truck two cardboard cartons similar in appearance to those earlier observed. A third such carton and a large paper bag that appeared to be filled with something were placed in the cab of the truck. When petitioners got into the truck and started to leave, Combs radioed the information and the signal "Go" to the four arresting agents, who, armed with the search warrant, had been standing by, awaiting the signal, two blocks from the premises being watched (H. 25–26, 39, 67–69, 95–96). The agents thereupon drove to the premises and the arrests of petitioners immediately followed.

As the agents leaped from their automobile to effect the arrests, the federal agents shouted their identities as "federal officers." The two cartons marked "Ball Mason Jars," which petitioners had just placed in the bed of the truck, were visible to the officers as they rounded the truck's rear end and proceeded toward the cab of the vehicle, where petitioners were (H. 8, 14–15, 39–40, 90). The State agents were the first to reach petitioners and it was they who made the physical apprehensions (H. 14–15, 79). Federal Agent Beeler had custody of the search warrant (H. 91, 95–96). For a period of three to five minutes following the arrests, the further performance by the officers of their duties was interrupted by some teen-age youngsters who, unaware of the officers' official identities and thinking that they had no business on the premises sought to interfere (H. 92–94). When, through

petitioner Houston's cooperation, the youths had been induced to leave, Agent Beeler advised petitioners that he had a federal search warrant and told Houston that he would give him a copy of it as soon as the search had been completed (H. 91, 93). The cartons in the bed of the truck—which apparently had not been opened up to this point—were then opened and their liquid contents, when found to be nontaxpaid whiskey, seized. The carton and the bag in the cab of the truck, which the officers had seen there when petitioners were apprehended, were opened at about the same time, and their contents, upon proving to be whiskey, were similarly confiscated (H. 8–9, 40, 91–92; Tr. 53, 65).

Using a key that had been removed from a pocket of petitioner Houston during a search of his person which had immediately followed his arrest, the officers then opened the locked door of the shed described in the warrant and found therein the additional whiskey to which reference has been made (H. 9–10; Tr. 66).

In his return to the search warrant, Agent Beeler listed all of the whiskey as having been seized pursuant to the warrant (Pet. App. 15–16; H. 27–28). Beeler testified at the hearing that the reason for his presence at the time and scene of the arrests was to serve the search warrant (H. 90, 91, 92) and arrest the petitioners (H. 90).

ARGUMENT

1. The district court properly denied the motion to suppress.

We question the court's ruling that the search warrant was invalid.[7] But, even assuming the warrant's invalidity, the searches and seizures were nevertheless valid.

[7] The ruling was based solely on the fact that the name of the maker of the supporting affidavit was, through a clerical error, omitted from the face of the warrant. But where, as here, the identity of the affiant is a matter of record, the affidavit itself is on file, and the affiant is available for interrogation by the court and counsel in the event that any question arises as to the affidavit's veracity or the existence of probable cause, it is not apparent how the inadvertent omission of the maker's name from the warrant is prejudicial. Cf. *Jones* v. *United States*, 362 U.S. 257, 270–272 (affiant may rely on unnamed informant's information if substantial basis exists for crediting it); *Rugendorf* v. *United States*, 376 U.S. 528, 533 (same; informant's identity need not be divulged in suppression proceeding). And see *United States* v. *Ventresca*, 380 U.S. 102 (affidavit supporting warrant should not be read stintingly). *King* v. *United States*, 282 F. 2d 398 (C.A. 4), on which the district court relied (Pet. App. 18), involved a warrant the affidavit for which had been made by one who had falsely represented her identity; the *dicta* in the opinion on which the district court apparently relied must be read in the light of that manifestly distinguishing fact. In *United States* v. *Kaplan*, 286 Fed. 963 (S.D. Ga.)—the only other decision cited (Pet. App. 18–20)—the court declared, in general terms, that a search warrant must state the names of the affiants (at 966 and 970), but the precise issue before the court to which the generalization was relevant does not appear from the opinion. It is true that Rule 41(c) of the Federal Rules of Criminal Procedure provides that the search warrant "shall state * * * the names of the persons whose affidavits have been taken in support thereof." However, at least where no prejudice is demonstrable or readily imaginable, sound construction would appear to require that, despite the normally mandatory "shall," the prescription be viewed as merely directory. Rule 36 provides that "Clerical mistakes in judgments, orders or other parts of the record and *errors in the*

Conceding *arguendo* that the officers' prime purpose in entering onto the Houston premises on the evening of the raid was to execute the search warrant, the existence of that purpose was not incompatible with a second objective—to arrest petitioners in the act of transporting nontaxpaid whiskey. Indeed, the record compels the conclusion that the officers had both objectives in mind. The coexistence of the two purposes is the evident reason why the officers delayed their entry onto the premises until, by the signal received from their fellow agent at the surveillance post, they knew petitioners were about to depart from the premises with a shipment of what the officers had every reason to believe was contraband whiskey.

Since the officers had clear probable cause for believing, immediately prior to the arrests, that petitioners had a shipment of nontaxpaid whiskey in their truck, the district court was correct in concluding that the arrests were lawful and that the search for and seizure of the whiskey were justified as lawful incidents of the arrests,[8] notwithstanding that the officers

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record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders" (emphasis added). The clerical oversight involved in this case would appear reasonably to be subject to that Rule. Candor requires us to acknowledge, however, that, although the government vigorously opposed petitioners' challenge to the warrant in the pleadings, it conceded the correctness of the court's judgment holding the warrant invalid after the decision had been rendered (Pet. App. 21).

[8] Petitioners' statement that it is "obvious * * * that there would have been no arrest had the search not been fruitful" (Pet. 5) is contradicted by the record. The record clearly establishes that the arrests preceded the search both of the truck and of the shed.

might have believed that in effecting the search and seizure they were engaged primarily in executing the search warrant. *Williams* v. *United States,* 273 F. 2d 781, 789–795 (C.A. 9), certiorari denied, 362 U.S. 951; *United States* v. *Jones,* 204 F. 2d 745, 747–748 (C.A. 7), certiorari denied, 346 U.S. 854; *Donahue* v. *United States,* 56 F. 2d 94, 97 (C.A. 9).[9] In the *Donahue* case, involving the seizure of a still in a dwelling house, the validity of the seizure depended on whether the officers entered the house to arrest the operator of a still known to be there and incidentally seized the still (valid) or whether they entered solely to search for a still (invalid). The court said (56 F. 2d at 97):

> The fact that the officers intended when they entered the premises to make a search of the premises for a still would not make the arrest illegal, if when they entered they were justified in so doing for the purpose of making the arrest which they did in fact make. Nor do we think that the failure of the officers, in their testimony, to assign as the purpose of their entry the making of the arrest, makes the arrest illegal. Nor does their statement that they intended to search for a still, if the fact justified it, necessarily eliminate the conclusion that they also intended to make the arrest when they entered the premises.

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[9] Compare *United States* v. *Rabinowitz,* 339 U.S. 56, 60 (arrest pursuant to warrant upheld because, though warrant may have been defective, officers had probable cause to believe felony was being committed in their presence); *Giordenello* v. *United States,* 357 U.S. 480, 488 (evidence held erroneously admitted because seized incidentally to arrest under invalid warrant; "This is not to say, however, that in the event of a new trial the Government may not seek to justify petitioner's arrest without relying on the warrant").

> It is familiar law that it is presumed that one intends to do that which he in fact does do. Therefore it is clear that the officers intended to make an arrest * * *.

This conclusion is fortified by the fact that the search warrant did not, at least specifically, authorize the search of the truck. The warrant directed search of the Houston residence "and adjacent premises". While the agents may well have thought that this clause of the warrant gave them authority to search the truck—because the truck was *on* premises so describable when it was intercepted and brought to a stop—ordinarily a movable vehicle is not considered a part of the premises on which it happens at a given moment to be.

Inasmuch as the shed was some distance from the point at which the arrests occurred [10] and the search of the structure occurred after the truck's search and required that the shed first be unlocked, justification of that search as an incident of the arrests is admittedly a more problematical matter.[11] We submit there is no need to attempt it. The search of the shed—a small outbuilding which was obviously no one's dwelling and hence was not subject to the strict safeguards that have historically been associated with that type of structure—was independently justifiable as inherently

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[10] The record indicates the distance to have been between 25 and 30 feet (H. 22).

[11] The more so, perhaps, for the very reason that the warrant specifically designated the shed for search. There can be no doubt from the record that the agents understood, in searching the shed, that they were executing the search warrant.

reasonable in the light of the agents' knowledge of the use to which petitioners were putting it, gleaned from five successive evenings of surveillance.[12] In any event, even if the search of the shed were deemed illegal, the fact would be immaterial: For the admission in evidence of the contraband found in the shed—because it provided merely cumulative evidence of guilt—was at most harmless error. See Rule 52(a), Fed. R. Crim. P.

2. There is no merit to petitioners' claim (Pet. 7–9) that they were entitled to know the identity of the agents' confidential informant. Particularly where, as here, the government agents personally verified the accuracy of the informant's information through surveillance, there is no necessity, in determining whether the agents had probable cause to make the arrests and conduct the searches, for the government to disclose the identity of its confidential source. Cf. *McCray* v. *Illinois*, 386 U.S. 300, 305–314; and see *Rugendorf* v. *United States*, 376 U.S. 528, 533.[13]

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[12] It is of course settled that only unreasonable searches and seizures are proscribed by the Fourth Amendment. *Preston* v. *United States*, 376 U.S. 364, 366–367; *United States* v. *Rabinowitz*, 339 U.S. 56, 60; *Harris* v. *United States*, 331 U.S. 145, 150; *Carroll* v. *United States*, 267 U.S. 132, 147. The rule permitting searches incident to valid arrests is but an application of that general principle. *Harris* v. *United States*, *supra*, at 150–152.

[13] Since the informant did not participate in the activities which constituted the offense, disclosure of his identity was of course not required under the principle of *Roviaro* v. *United States*, 353 U.S. 53. Cf. *Rugendorf* v. *United States*, *supra*, at 534–536.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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